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BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Banks, Redmond, Sunriver and Corvallis, Oregon)

MM Docket No. 96-7
RM-8732
RM-8845

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations
(The Dalles and Corvallis, Oregon)

MM Docket No. 96-12
RM-8741

In re Application of

Madgekal Broadcasting, Inc.
Station KFLY(FM), Corvallis, Oregon

File No. BPH-960206IE

For Construction Permit to Modify
Licensed Facilities (One-Step Upgrade)

To: Chief, Allocations Branch
Mass Media Bureau

PETITION FOR RECONSIDERATION

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SUMMARY

On reconsideration of the Report and Order in the above-captioned proceeding, the Commission's staff is urged to approve the settlement agreement between Madgekal Broadcasting, Inc. ("MBI") and American Radio Systems License Corp. ("American Radio"). MBI and American Radio have presented in good faith a settlement to resolve the conflict between MBI's modification application and American Radio's rule making petition. Given that the settlement does not fall squarely within the ambit of Section 1.420(j) or Section 73.3525 of the Rules, and given the strong policy of Congress and the Commission is favor of settlements, this settlement should be approved. In doing so, the conflicts between the parties will be brought to an end and expanded service can be provided quickly by both American Radio's KBBT-FM, Banks, Oregon, and MBI's KFLY, Corvallis, Oregon.

If the settlement is not approved, the Commission must choose between the KFLY upgrade and the conflicting proposals before it. As an initial matter, the proposed allotment of Channel 268C3 at The Dalles should not be considered for any one of five reasons: (1) a reserved band noncommercial frequency is available for use at The Dalles; (2) a fully spaced station operating on Channel 268C3 will not be able to place a city-grade signal over The Dalles; (3) a non-conflicting allotment, Channel 256C3, is available at The Dalles; (4) the Commission's cut-off rule, Section 73.208(a)(3)(iii), should have precluded consideration of Channel 268C3 at The Dalles because the Commission, not LifeTalk, presented that alternative frequency only after MBI's application was filed; and (5) LifeTalk's failure to affirmatively state it would build a tall tower rendered its expression of interest defective.

Faced with a comparison between the KFLY upgrade and the KBBT-FM upgrade, the KFLY upgrade must be preferred.

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PETITION FOR RECONSIDERATION

Madgekal Broadcasting, Inc. ("MBI"), licensee of Station KFLY(FM), Corvallis, Oregon,
herein petitions for reconsideration of the Report and Order in the above-captioned proceeding, DA

98-612, 62 Fed. Reg. 19663 (April 21, 1998) (hereinafter ("R&O").¹ In support of this petition, the following is stated:

I. BACKGROUND

On February 6, 1996, MBI filed an application for a one-step upgrade of Station KFLY from Class C2 to Class C status on Channel 268. Unbeknownst to MBI, its application was in conflict with a rule making petition looking toward an upgrade of Station KDBX(FM) (now KBBT-FM), Banks, Oregon, from Class C2 to Class C1 on Channel 298.² To accommodate the Banks upgrade, substitution of Channel 269C2 for Channel 298C2 at Redmond, Oregon, was requested as was the modification of the license of Station KLLR, Redmond, Oregon, to specify the substitute channel. On the same day that MBI's application was filed, the Commission, in response to the Banks upgrade petition, released a Notice of Proposed Rule Making and Order to Show Cause, 11 FCC Rcd 1686 (Chief, Allocations Branch, 1996) (hereinafter "Banks NPRM").

¹ Although the Report and Order was released by the Commission on April 3, 1998, it was not published in the *Federal Register* until April 21, 1998. Publication in the *Federal Register* constitutes "public notice" of the Report and Order, 47 C.F.R. §1.4(b)(1). This Petition for Reconsideration is being filed within 30 days of publication of the Report and Order in the *Federal Register* and, thus, is timely. 47 C.F.R. §1.429(d).

² Subsequent to the filing of the petition, the Banks station was assigned by Common Ground Broadcasting, Inc. to American Radio Systems License Corp. ("American Radio") and the call letters of the station were changed to KBBT-FM. For the purposes of this petition, MBI will refer to the Banks licensee as "American Radio" and the station as "KBBT-FM."

Also unbeknownst to MBI, its application was in conflict with an alternate channel the Commission proposed in response to a petition for rule making filed by LifeTalk Broadcasting Association (“LifeTalk”) for a new FM channel at The Dalles, Oregon. LifeTalk had requested the allotment of Channel 256C3 at The Dalles³ and reservation of that channel for noncommercial educational use. A week after MBI’s application was filed, the Commission issued a Notice of Proposed Rule Making, 11 FCC Rcd 1788 (Chief, Allocations Branch, 1996) (hereinafter “The Dalles NPRM”) proposing allotment of Channel *268C3, rather than Channel *256C3, because a station operating on Channel 256C3 supposedly would have covered only half of The Dalles with a 70 dBu city-grade signal.⁴ (As demonstrated herein, in fact all of The Dalles would receive a city-grade signal from a station on Channel 256C3, whereas a station operating on Channel *268C3 would not be able to provide a city-grade signal to The Dalles due to terrain obstructions.) The Commission’s proposed reservation of Channel *268C3 for noncommercial educational use was based on a determination that no channel was available in the reserved portion of the band. (As discussed below, however, a C3 channel is available in the reserved portion of the band at The Dalles.)

In The Dalles NPRM, the Commission stated that to overcome intervening terrain obstructions between the proposed site and the community, a tower of at least 209 meters (686 feet) would be required. On the basis of that determination, an additional obligation was imposed on the

³ Allotment of Channel 256C3 would not conflict with MBI’s upgrade application.

⁴ LifeTalk did not propose Channel *268C3 as an alternate channel. It merely referenced in passing Channel 268C3 as one of three channels available for “commercial operation in the area.” See pp. 18-20 infra, and Exhibit B hereto.

proponent of The Dalles allotment: "Because a Class C3 station, without such obstructions, can generally provide city-grade coverage with a tower of only 100 meters, petitioner is requested to affirmatively state that it would apply for and construct a station with the necessary higher tower." 11 FCC Rcd at 1788, ¶ 3.

The petitioners in the Banks/Redmond proceeding filed comments supporting their proposed allotments. LifeTalk filed brief comments in support of the allotment of Channel* 268C3, but did not, as The Dalles NPRM required, "affirmatively state that it would apply for and construct a station with the necessary higher tower."

MBI's application, because it was mutually exclusive with the proposed substitution of Channel 269C2 at Redmond and the proposed allotment of Channel *268C3 at The Dalles, was treated as a counterproposal in both the Banks/Redmond proceeding and The Dalles proceeding. See Public Notice, Rpt. No. 2135 (released June 5, 1996).⁵

MBI filed comments on July 5, 1996, stating that if no alternative channels were available for allotment at Redmond and The Dalles, the public interest would be better served by granting the application to upgrade KFLY. MBI noted, inter alia:

⁵ Also filed was a counterproposal from Hurricane Broadcasting, Inc. ("Hurricane"), requesting allotment of Channel 269C2 to Sunriver, Oregon. That proposal conflicted with the proposed channel substitution at Redmond. Because the R&O allotted a non-conflicting alternative frequency to Sunriver, Channel 224C2, the Sunriver allotment need not be further discussed.

- (a) Corvallis receives local FM service from only two commercial FM stations (one of which was KFLY), two commercial AM stations (KEJO and KLOO), and two noncommercial stations (KOAC(AM) and KVBR(FM)).
- (b) The 1994 Census Bureau estimated population of Corvallis was 46,244 persons. The 1995 Census Bureau estimate for Benton County, in which Corvallis is located, was 75,235 persons.
- (c) Banks' population as of 1994 was 654 persons.
- (d) Banks is a suburb of Portland, which is the nation's 24th largest radio market and has more than 40 stations.
- (e) The Dalles had a 1990 population of 11,060 persons and received local service from three commercial FM stations and two commercial AM stations.

In its comments, MBI also noted that LifeTalk had failed to affirmatively state that it would apply for and construct a station with the necessary higher tower and, accordingly, its rule making petition should be dismissed.

On July 15, 1996, after the record closed, LifeTalk filed a supplement in response to MBI's comments. In its supplement, LifeTalk asserted "[i]mplicit within LifeTalk's comments was its intention to apply for a facility that would meet at least the minimum requirements of the Commission's rules including city-grade signal coverage to the community of license." Interestingly, LifeTalk, in its supplement, still did not explicitly commit to building a tall tower (at least 290 meters). MBI, on July 24, 1996, moved to strike LifeTalk's supplement. LifeTalk filed an opposition on August 7, 1996. In its opposition, LifeTalk again did not explicitly commit to building a tall tower. Rather, it stated, e.g., "LifeTalk's intentions to apply for the type of facility which the Commission requires to be constructed at The Dalles certainly were implicit in LifeTalk's original comments of April 5, [1996]."

In response to the Public Notice regarding KFLY's application, the Banks/Redmond proponents proposed a new reference point for Channel *268C3 at The Dalles and a Class C1, rather than a Class C, upgrade for KFLY. The Banks/Redmond proponents also argued that if their "global solution" was not adopted, the upgrade of KBBT-FM, Banks, and the allotment of a new noncommercial frequency to The Dalles should be preferred over the upgrade of KFLY -- notwithstanding that KFLY, operating with Class C facilities, would serve an additional 325,969 persons, compared to an aggregate net gain in service area population of 270,406 persons from the upgraded allotment at Banks and the new allotment at The Dalles.

After the record had closed, America Radio and MBI reached a settlement to remove the conflict between the KFLY upgrade application and the Banks/Redmond allotment proposal. On March 20, 1997, the settlement was filed with the Commission along with a request for its approval.

Under the settlement, if approved by the Commission, MBI's application would be amended to specify Channel 268C1, instead of Channel 268C. In return for doing so (and thereby clearing the way for adoption of the Banks/Redmond allotment), American Radio would pay MBI \$950,000. MBI and American Radio argued that the agreement to modify MBI's application was not a request for withdrawal or dismissal of "an expression of interest" within the meaning of Section 1.420(j) of the Commission's Rules. The parties also argued that Section 73.3525 of the Rules was not applicable because there was not a conflict between two construction permit applications. Rather, there was only a single application, MBI's, involved. No opposition to the joint request was filed.⁶

On August 26, 1997, MBI and American Radio filed further comments in support of the petition. Therein, they took note of the Commission's then-recent decision in Gonzales Broadcasting, Inc., 12 FCC Rcd 12253 (1997), in which the Commission, following the directive of Congress in Section 3002(a)(3) of the Balanced Budget Act of 1997, waived Section 73.3525(a)(3) of the Rules to permit settlement payments in excess of the dismissing applicants' reasonable and prudent expenses. In their joint comments, MBI and American Radio noted that Congress had obligated the

⁶ Hurricane, however, did file comments stating it had no objection to the settlement provided that Sunriver, Oregon, received an FM application.

Commission to try to eliminate mutual exclusivity through the use of, inter alia, negotiations. See CONG Rec. Daily Ed. (July 29, 1997) H6173 (discussion in Conference Report of Commission's continuing obligations under Section 309(j)(6)(E) of the Communications Act to "use engineering solutions, negotiation, threshold qualifications, service regulations, and other means to avoid mutual exclusivity in application and licensing proceedings").

The R&O rejected the American Radio/MBI settlement as conflicting with Section 1.420(j) of the Rules. The R&O also held that from the alternate antenna site American Radio proposed for Channel *268C3 at The Dalles an extraordinarily tall tower would not be necessary. On the basis of that conclusion, the R&O dismissed as moot the question whether LifeTalk's petition should be dismissed.⁷ Thereafter, the Commission comparatively considered the proposed allotments at The Dalles and Banks versus the KFLY upgrade and concluded that combination of the Banks and The Dalles proposals would better serve the public interest.

II. RELIEF REQUESTED

For the reasons discussed below, MBI believes the actions taken in the R&O should be modified in the following respects:

⁷ As discussed below, the R&O was in error. Even if a 1500-foot tall tower were constructed, The Dalles would not be able to receive a city-grade signal from a station operating on Channel *268C3.

1. The settlement agreement between MBI and American Radio should be approved.

2. Channel *268C3 should not be allotted to The Dalles for any one of the following reasons:
 - (a) As demonstrated in the Engineering Report of McClanathan and Associates, Inc. ("McClanathan Report"), attached as Exhibit A hereto, noncommercial educational channels are in fact available for use at The Dalles. For example, a Class C3 station operating on Channel 215C3 could be located at an existing communications site and provide service to The Dalles -- without contravening of the Channel 6 interference rules.

 - (b) A fully spaced station operating on Channel *268C3 would be unable, due to terrain obstructions, to provide a city-grade signal to The Dalles. See McClanathan Report.

 - (c) Channel, 256C3, which LifeTalk originally proposed, is available for allotment at The Dalles and would be able to provide a city-grade signal to The Dalles. See McClanathan Report.

- (d) The proposal to allot Channel *268C3 to The Dalles, instead of Channel *256C3 as LifeTalk requested, was first raised by the Commission itself in The Dalles NPRM, which was released after MBI's application was filed. Accordingly, under the pertinent cut-off rule, Section 73.208(a)(3)(iii), the allotment of Channel *268C3 to The Dalles should not have been considered.
- (e) By failing to "affirmatively state it would apply for and construct a station with the necessary higher tower [i.e., at least 209 meters]," LifeTalk violated Section 73.1015 of the Rules by failing to supply a statement called for by the Commission. Therefore, LifeTalk's petition should have been dismissed.

3. If the American Radio/MBI settlement is ultimately rejected, the KFLY upgrade should be found to better serve the public interest than either the Banks upgrade by itself or the combination of the Banks upgrade and the proposed allotment of Channel *268C3 at The Dalles.

III. DISCUSSION

A. The Settlement Agreement Between American Radio and MBI Should Have Been Approved

Faced with a conflict between their upgrade proposals, MBI and American Radio, acting in good faith, reached an accommodation between themselves. In exchange for a payment of \$950,000, MBI would accept something less than it wanted -- Class C1 facilities, rather than Class C facilities

for KFLY. In the bargain, American Radio would get what it sought -- the ability to specify Class C1 facilities for KBBT-FM.

Because MBI filed a modification application and American Radio filed a rule making proposal, their settlement fell between Section 1.420(j), which involves the withdrawal of “an expression of interest” in a rule making proceeding, and Section 73.3525, which concerns the removal of conflicts between mutually exclusive construction permit applications.⁸ Given this unusual, if not unique, set of circumstances, and given the Commission’s general policy in favor of settlements, MBI and American Radio urged approval of the settlement agreement. The Chief, Allocations Branch, refused to do so. R&O at ¶ 14, citing Abuses of Commission Processes, 5 FCC Rcd 3911 (1990) recon. denied, 6 FCC Rcd 3380 (1991). The Chief held that MBI’s application for a one-step upgrade fell within the ambit of Section 1.420(j) of the Rules, notwithstanding that the Commission did not adopt its one-step application procedures until some three years after adoption of Section 1.420(j). See FM Channel and Class Modifications by Application, 8 FCC Rcd 4735, 4739 (1993).

Furthermore, notwithstanding the enactment of Section 3002(a)(3) of the Balanced Budget Act of 1997 (codified as Section 309(l) of the Communications Act) and the Commission’s indication in Gonzales Broadcasting, supra, that it would look favorably on requests to waive other policies in order to facilitate settlements, the Chief declined to approve the settlement presented here.

⁸ As discussed below, due to the fact that only American Radio can take advantage of the change in the Banks allotment, American Radio’s rule making petition is akin to an application.

Under Section 309(l) of the Act, with the respect to competing applications for “initial licenses or construction permits” for commercial stations filed before July 1, 1997, the Commission shall “waive any provisions of its regulations necessary to permit such persons to enter an agreement to procure the removal of a conflict between their applications during the 180-day period beginning on the date of enactment of the Balanced Budget Act of 1997.” Of course, MBI did file an application for a commercial station before July 1, 1997. Furthermore, its modification application can be properly construed as an application for an “initial license or construction permit.” See Notice of Proposed Rule Making in MM Docket No. 97-234, et al, 12 FCC Rcd 22363, 22382 (¶ 47) (1997) (operative language in Section 309(j) of the Communications Act -- any initial license or construction permit -- interpreted as including a mutually exclusive modification application). Obviously, if American Radio had been able to file a mutually exclusive one-step upgrade application, rather than a rulemaking proposal, the settlement agreement between MBI and American Radio would fall within the scope of Section 309(l)(3) of the Act. American Radio’s proposal, however, is the “functional equivalent” of a one-step upgrade application. Upon adoption of the allotment proposal presented, only KBBT-FM is eligible to apply for the upgraded facility at Banks, Oregon. No conflicting application may be filed. Thus, the R&O is mistaken in stating at ¶ 15 that after this proceeding is concluded, “the allotments would be the subject of comparative applications for construction permits

and/or licenses.” Given the strong policy in favor of avoidance of mutual exclusivity,⁹ the settlement here should have been approved.

B. Channel *268C3 Should Not Be Allotted to The Dalles

In choosing to allot Channel *268C3 at The Dalles, the Commission concluded (a) no reserved band noncommercial frequency was available at The Dalles due to Channel 6 preclusion (R&O, ¶17, n. 18), (b) Channel *263C3, the channel originally proposed by LifeTalk, was not available for allotment due to terrain obstructions (The Dalles NPRM, ¶ 1, n. 1) and (c) construction of a fully spaced station operating on Channel 268C3 at The Dalles would not require the use of anything more than conventional facilities to provide the entire community with a city-grade signal (R&O, ¶17). As demonstrated in the attached McClanathan Report, all three conclusions are in error. Obviously, consideration of the facts set forth in the McClanathan Report is required in the public interest. See 47 C.F.R. §1.429(b)(3). Furthermore, the Commission’s own cut-off rules should have precluded consideration of allotment of Channel *268C3, rather than Channel *256C3, after the filing of KFLY’s application. Finally, LifeTalk’s failure to commit to the construction of a tall tower, which commitment was explicitly required in The Dalles NPRM, rendered its “expression of interest” defective and in violation of Section 73.1015 of the Commission’s Rules. Accordingly, its rule making petition should have been dismissed.

⁹ See, e.g., 47 U.S.C. at §309(j)(6)(E) (provisions pertaining to use of competitive bidding not to be construed to relieve the Commission of the obligation in the public interest to avoid mutual exclusivity in application and licensing proceedings of the use of, inter alia, engineering solutions and negotiation).

1. At Least One Reserved Band Frequency Is Available At The Dalles

The McClanathan Report demonstrates that using the Stacker Butte site near The Dalles, which is the site of numerous translators serving the community, a noncommercial educational station with at least minimum Class C3 facilities could be constructed. A study was specifically conducted for Channel 215C3 (90.7 MHz). Operating with 0.20 kw at an antenna height 561 meters above average terrain,¹⁰ a noncommercial educational station operating on Channel 215C3 would have an interference area vis-a-vis, KOIN-TV, Channel 6, Portland, with a population of only 497 persons. Since this is far less than the 3,000 persons permitted by Section 73.525(c) of the Rules, that channel is obviously available at The Dalles. Moreover, the McClanathan Report indicates that Channel 201, 211 and 213 may also be available. Given the fact that at least one reserved band frequency is available at The Dalles, the community is not eligible for a reserved noncommercial educational frequency outside of the reserved portion of the band. E.g., Ukiah, California, 11 FCC Rcd 13933 (Chief, Allocations Branch, 1996), recon. denied, 12 FCC Rcd 2414 (Chief, Policy and Rules Div. 1997); Collegeville, Minnesota, 10 FCC Rcd 328 (Chief, Allocations Branch 1995).

2. A Fully Spaced Station Operating on Channel *268C3 Cannot Provide a City-Grade Signal to The Dalles

The Dalles is located on the south shore of the Columbia River, which separates Oregon and Washington. The city is surrounded by hills on the southeast, south and southwest. See McClanathan Report, p. 1. Most of The Dalles, including nearly all of the business and industrial

¹⁰ Given the height of above average terrain at Stacker Butte, a station there with an ERP of 0.20 kw would still be classified as a C3 facility.

areas, is located in low elevations near the Columbia River in an area shaped somewhat like the bottom of a bowl. Id.

Many of the antenna sites for FM and TV broadcast stations serving The Dalles are located on Stacker Butte, which is located across the Columbia River approximately 14 kilometers north of The Dalles. Another existing radio communications site is on Haystack Butte, which is also located north of the Columbia River and is to the east of The Dalles. Id., pp. 1-2.

In order for Channel *268C3 to be fully spaced, the transmitter site must be located to the south of The Dalles. Because The Dalles is surrounded by high ridges, terrain obstructions between any fully spaced site and The Dalles city area will preclude delivery of a city-grade signal. The obstructions are so severe that even a very tall tower will not overcome the terrain shielding. The McClanathan Report demonstrates that from the coordinates referenced at n. 20 of the R&O (45-34-00 NL, 120-55-00 WL), even with a 213 meter (700 foot) tower, all of The Dalles would be severely shadowed. Indeed, even with a 474 meter (1,555 foot) tower, less than one-half of The Dalles would receive a line-of-sight signal. See McClanathan Report, p. 4 and Ex. 8.

A similar study was conducted using the coordinates referenced in The Dalles NPRM at n. 3 (45-31-28 NL, 121-07-22 WL). From that site, even using a 700-foot tower, The Dalles would not receive a line of sight signal due to significant terrain obstructions. McClanathan Report, p. 4 and Ex. 9.

In summary, the allocation of Channel *268C3 to The Dalles is unsuitable because, from a fully spaced site, severe terrain obstructions render it impossible to deliver a city-grade signal to the community. Commission precedent, therefore, indicates that the allotment should not be made. E.g., Jefferson City, Tennessee, et. al. 10 FCC Rcd 12207, 12209 (Chief, Allocations Branch 1995), recon. denied, 13 FCC Rcd 2303 (Chief, Policy and Rules Div. 1998); Eugene, Oregon, 10 FCC Rcd 9793 (Chief, Allocations Branch 1995); Belfry and Harold, Kentucky, 6 FCC Rcd 6019, 6020 (Asst. Chief, Allocations Branch 1991); Creswell, Oregon, 4 FCC Rcd 7040 (Chief, Policy and Rules Div. 1989) (denying reconsideration).

Thus, even assuming arguendo that no reserved band frequency were available for use at The Dalles, allotment of Channel 268C3 to that community is inappropriate given the absence of a fully spaced technically suitable transmitter site. Significantly, as demonstrated below, The Dalles could be served by another frequency, Channel 256C3.

3. A Non-Conflicting Channel Available for Allotment at The Dalles

In its Petition for Rule Making (included as Exhibit B hereto), LifeTalk proposed the allotment of Channel *256C3 at The Dalles.¹¹ The Commission staff, in The Dalles NPRM, determined that a station operating on Channel 256C3 would have to be located 22.8 kilometers from The Dalles and that only half the community would be covered by a 70 dBu signal. In fact, as the

¹¹ As discussed below, while LifeTalk noted in passing that three additional open channels exist “for commercial operation in the area” (LifeTalk Petition at ¶ 3), it did not propose those other channels for noncommercial educational allotment at The Dalles.

McClanathan Report demonstrates, using a transmitter site at Haystack Butte (45-41-01 NL, 120-57-17 WL),¹² a station operating on Channel 256C3 would be able to provide a city-grade signal to The Dalles as well as Goldendale, Washington. See Exhibit 11 of McClanathan Report.

Significantly, allotment of Channel 256C3 at The Dalles would not conflict with the proposed upgrade of Station KFLY to Class C status as specified in BPH-960206IE. It is the Commission's policy to avoid allotment conflicts where possible. E.g., Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments, 8 FCC Rcd 4743, 4745 n. 12 (1993). Here, allotment of Channel *256C3, as LifeTalk originally proposed, would serve that policy.¹³

4. The Commission's Cut-Off Rules Preclude Allotment of Channel *268C3 to The Dalles

The Commission's Rules prohibit filing a conflicting rule making proposal after an FM application has been cut-off. Minor change applications are protected from conflicting rule making proposals on the "date they are received at the Commission." 47 C.F.R. §73.208(a)(3)(iii). Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments, 7 FCC Rcd 4917, 4919 (1992) (hereinafter "Conflicts"), recon. granted in part, 8 FCC Rcd 4743 (1993).

¹² As noted above, Haystack Butte is an existing communication site. McClanathan Report, p. 2.

¹³ A conflict would remain, however between the KFLY modification application and the proposal to substitute Channel 269C2 for Channel 298C2 at Redmond, Oregon, in order to accommodate American Radio's desire to upgrade KBBT-FM at Banks, Oregon.

LifeTalk's petition for rulemaking, filed on November 20, 1995, presented no conflict with MBI's one-step minor change application filed on February 6, 1996. The conflict arose only when the Commission released The Dalles NPRM on February 13, 1996, seven days after MBI filed its application, and seven days after the cut-off for conflicting rulemaking proposals. In doing so, the Commission violated its own cutoff rule, which was adopted precisely for the purpose of preventing this situation.

The Commission adopted the cut-off policy of Section 73.208(c)(3) because of the tremendous uncertainty and delay associated with its previous approach, which left applicants in a position of "unlimited exposure to potentially conflicting petitions." Conflicts at 4919. The previous policy was "both inequitable and inconsistent with our treatment of mutually exclusive proposals in both the allotment and application contexts," said the Commission. Id. "Given the time and effort required by FM applicants to secure new transmitter sites, we believe that FM applicants. . . . should receive protection from conflicting rulemaking proposals at the same time that they receive protection from other mutually exclusive applications." Id.

Thus, initial consideration of any allotment for The Dalles that would conflict with KFLY's application for Class C facilities was proscribed as of the date MBI's application was filed. The cut-off rule clearly applies in cases where the Commission itself, rather than a member of the public, proposes to use an alternative channel to resolve a conflict between mutually exclusive proposals. Id. at 4920. As the Commission stated in Conflicts, "it would be in

inequitable for the Commission to use generally alternative channels in a way that would prejudice the FM applicant who already has cut-off protection." Indeed, in providing an example of how the rule applies to the Commission, Conflicts describes a scenario very close to the one present here. Id. n. 20.

In this case, as in the Commission's example, it was both unfair and a violation of the rules for the Commission to select Channel *268C3 as an alternative channel for The Dalles. MBI had no notice that any alternative channel was contemplated. LifeTalk proposed no alternative channels in its petition. It sought only the allotment of non-conflicting Channel *256C3. LifeTalk merely noted that three channels in the area remained available for "commercial operation in the area," but in no way suggested any of these as alternate frequencies. Indeed, the plain language of the petition clearly indicates that LifeTalk's observation regarding available commercial channels was made to support its argument that Channel 256C3 at The Dalles should be reserved for non-commercial educational use. Put simply, there was no proposal to use the alternative channel that would justify the Commission's consideration of Channel *268C3 after the filing of KFLY's application. Id. at 4920.

**5. LifeTalk's Failure to Respond to the Commission's
Explicit Directive in The Dalles NPRM Precludes
Consideration of Its Allotment Proposal**

Under Section 73.1015 of the Commission's Rules, the Commission may require any person filing an "expression of interest in an FM or TV allotment proceeding to submit written statements of fact relevant to that allotment proceeding."

In The Dalles NPRM, the Chief, Allocations Branch, called upon LifeTalk to submit a specific written statement of fact:

[T]o overcome intervening terrain obstructions between [the proposed site] and The Dalles, a tower of at least 209 meters (686 feet) is required. Because a Class C3 station, without such obstructions, can generally provide city-grade coverage with a tower of only 100 meters, Petitioner is requested to affirmatively state it will apply for and construct a station with the necessary higher tower.

The Dalles NPRM at ¶ 3 (emphasis added).

LifeTalk, in its comments filed April 5, 1996, did not affirmatively state that it would "apply for and construct a station with the necessary higher tower." That defect was noted in MBI's comments filed July 5, 1996. In reply comments filed the same day, LifeTalk reiterated a commitment to file an application for Channel *268C3 if allotted - but was silent as to whether it would build a tall tower. In its supplement, filed July 15, 1996, it danced around the question of a tall tower. After noting MBI's comments, LifeTalk stated: "Implicit within LifeTalk's commitment was its intention to apply for a facility that would meet at least the minimum requirements of the

Commission's rules, including providing city-grade signal coverage to the community of license." But that's not what the Commission asked. The Dalles NPRM did not call for a commitment only to place a city-grade signal over a community; it called for a commitment to "apply for and construct a station with the necessary higher tower." Because LifeTalk failed to make that commitment, its expression of interest was defective and its rulemaking proposal should have been dismissed.

The R&O tries to avoid the question as to the inadequacy of LifeTalk's expression of interest. It finds MBI's point to be moot because, supposedly, the theoretical antenna site for Channel *268C3 at The Dalles would not require the use of the extraordinarily tall tower proposed in The Dalles NPRM. R&O at ¶1 n. 5. As demonstrated above, the use of Channel *268C3 at The Dalles would require the construction of an extraordinarily high tower (in excess of 474 meters).¹⁴ Thus, if Channel *268C3 is to be considered for allotment at The Dalles at all, LifeTalk's failure to respond to the explicit directive set forth in The Dalles NPRM remains at issue and is fatal.

Thus, for any of the five reasons set forth above, Channel *268C3 should not -- and indeed must not -- be considered for allotment at The Dalles.

¹⁴ See McClanathan Report at p. 4.